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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

NATIONAL WILDLIFE FEDERATION, *et al.*,
Plaintiffs,

Civil No. 01-640-RE (Lead Case)
05-0023-RE (Consolidated Case)

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*,
Defendants.

**MEMORANDUM OF AMICUS
NORTHWEST POWER AND
CONSERVATION COUNCIL**

The Northwest Power and Conservation Council has limited its participation in this litigation to matters directly related to the Council's statutory responsibilities under the Northwest Power Act. This includes (1) informing the Court and other participants of the provisions of the Northwest Power Act and the Council's *Columbia River Basin Fish and Wildlife Program* as they relate to issues raised in this litigation and (2) asserting the Council's interests under the Northwest Power Act, especially in terms of ensuring that the off-site mitigation habitat and production measures included in Biological Opinion analyses as actions proposed for implementation by the Bonneville Power

Administration, and any decisions by the Court related to those habitat and production measures, satisfy the Northwest Power Act. The Council takes no position on whether the substantive requirements of the Endangered Species Act itself have or have not been satisfied in any particular Biological Opinion.

The NWF Plaintiffs make one argument in their summary judgment memorandum that particularly implicates the Council's Northwest Power Act interests. These plaintiffs argue that the tributary habitat improvement measures analyzed in the 2008 FCRPS Biological Opinion, and related habitat actions included in the associated MOAs (or Columbia Basin Fish Accords), must be excluded from the jeopardy analysis as not reasonably certain to occur *for the reason* that not all measures have been shaped yet into specific projects for implementation and "the MOAs do not guarantee that any specific project(s) will occur because funding for these projects must still be approved by the Northwest Power and Conservation Council." The NWF Plaintiffs make a similar argument with respect to estuary mitigation actions included in the Biological Opinion analysis. *Memorandum in Support of NWF's Motion for Summary Judgment*, 22-25, esp. 24 n. 18.

The Northwest Power Act does indeed require an integrated independent science review and Council review of habitat programs implemented by Bonneville, and this review requirement does govern Bonneville's implementation of the habitat measures in the Biological Opinion and Accords. The fact of this review process does not mean the Court must conclude the habitat measures are not *reasonably* certain to occur. The Council is concerned that a decision by the Court that accepts the ultimate conclusion pressed by the NWF Plaintiffs might undermine, inadvertently and unnecessarily, the

region's ability to use review processes required by the Power Act that help ensure projects will be implemented in a scientifically sound manner. The purpose of this memorandum is to make the Court aware of these implications and ask it to reject this argument.

In the Northwest Power Act, Congress took the unusual step of authorizing the four states of the Columbia Basin -- Idaho, Montana, Oregon and Washington -- to form an interstate agency to develop energy and fish and wildlife plans and programs addressing the effects and the future role of the federally-dominated Columbia hydroelectric system. The Northwest Power Act then imposed legal obligations on Bonneville and the other federal agencies involved in that system with respect to the Council's plans and programs. Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§839-839h. Section 4(h) of the Power Act in particular directs the Council to adopt and periodically amend a "program to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries." Sections 4(h)(1) through (7) describe an elaborate public process and set of standards for the Council to follow in adopting and amending the Fish and Wildlife Program, a program built largely from the recommendations of other entities, primarily the state and federal fish and wildlife agencies and the basin's Indian tribes.

The current version of the program is the Council's *2000 Columbia River Basin Fish and Wildlife Program*, as supplemented by the 2003 Mainstem Amendments and Subbasin Plans for 57 subbasins of the Columbia adopted in 2004-05. *See*

<http://www.nwcouncil.org/fw/program/Default.htm>.¹ The Council's program includes measures and objectives that directly address the effects of the mainstem Columbia and Snake river hydroelectric dams on fish and wildlife, listed and unlisted. The program also includes habitat and production enhancement measures for the Columbia's many tributaries and the estuary, intended as off-site mitigation for effects of the hydrosystem that cannot be protected against or mitigated in the mainstem. The off-site mitigation elements included and analyzed in the 2008 FCRPS Biological Opinion and developed in the Columbia Basin Fish Accords are based on a foundation built over 28 years in the Council's Fish and Wildlife Program.

The key point is that the relationship between the Council's regional program and review processes and these Biological Opinion and Accord actions is based on more than comity. The Northwest Power Act directs Bonneville to use its fund and other authorities to protect, mitigate and enhance fish and wildlife affected by the Columbia hydroelectric projects "in a manner consistent with" the Council's Fish and Wildlife Program, the Council's regional power plan, and the purposes of the Power Act. 16 U.S.C. §839b(h)(10)(A); *Northwest Environmental Defense Center v. Bonneville Power Administration*, 477 F.3d 668 (9th Cir. 2007). The other federal agencies that operate, manage or regulate the federal and non-federal projects on the Columbia, including the Corps of Engineers and the Bureau of Reclamation, have a related set of obligations to the Council's program in Section 4(h)(11). The Endangered Species Act does not provide Bonneville and the other Action Agencies with additional authority; the agencies

¹ The Council is in the middle of a process to amend its Fish and Wildlife Program, following the procedures set forth in the Northwest Power Act. One of the key topics in this amendment process is how to integrate the recent developments regarding listed species into the broader mitigation program addressing all fish and wildlife affected by the Columbia River hydrosystem.

must make use of their existing authorities to try to solve ESA problems. *It is precisely because* Bonneville has authority and an obligation under Section 4(h)(10)(A) of the Northwest Power Act to use its fund to implement, among other things, off-site protection and mitigation actions that it may bring this authority to bear to address the problems of ESA-listed species. But, Bonneville must then also exercise that authority in a manner consistent with the Council's Fish and Wildlife Program and consistent with the provisions of the Northwest Power Act.

One of these critical provisions of the Power Act requires independent scientific review accompanied by public and Council review of Bonneville's implementation of the Fish and Wildlife Program. In 1996 Congress added Section 4(h)(10)(D) to the Northwest Power Act, obliging the Council to review all projects proposed for funding to implement the measures in the Council's program. The Council is to conduct this review with the assistance of the Independent Scientific Review Panel. The ISRP reviews proposed projects and makes recommendations to the Council that "shall be based on a determination that projects: are based on sound scientific principles; benefit fish and wildlife; and have a clearly defined objective and outcome with provisions for monitoring and evaluation of results." The ISRP must also ensure that the collection of projects is consistent with the priorities in the Council's program. The ISRP is to review "the results of prior year expenditures based upon these [same] criteria," and submit these findings to the Council for review as well. The Power Act instructs the Council to allow the public an opportunity to review and comment on the ISRP's report. The project review process then culminates in recommendations from the Council to Bonneville, as well as written explanations by the Council if and when its project recommendations to Bonneville

deviate from the advice of the science panel. Northwest Power Act, Section 4(h)(10)(D), 16 U.S.C. §839b(h)(10)(D).

The habitat measures Bonneville plans to implement in the next ten years and included for analysis in the 2008 Biological Opinion, and the associated habitat actions further developed in the Accords, are subject to this Northwest Power Act review process. Specifically, the measures will be developed into project details at the appropriate moments over the next ten years and receive periodic independent scientific review, followed by public and Council review. The review is intended to ensure, among other things, that the projects actually implemented are technically sound and are likely to benefit the focal species. The review process also allows for adaptive management improvements over time, the intent of which is to increase the likelihood of fish and wildlife benefits occurring from particular actions. What Bonneville has guaranteed is a financial commitment to implement a suite of habitat measures identified in the Biological Opinion and Accords that attempt to address the limiting factors identified in the Biological Opinion (based on factors identified first in the Council's subbasin plans and the NOAA Fisheries recovery plans). These habitat improvement actions will emerge in final form shaped into scientifically sound projects through the Council's review process.

There is no reason to believe that the result of this process will be a suite of implemented habitat actions that is less substantial than the magnitude of actions expected in the Biological Opinion and the Accords, however the Court might view the sufficiency of those actions in satisfying the requirements of the ESA. The Council successfully used this review process to deliver a scientifically sound package of projects

for implementation by Bonneville consistent with the habitat enhancement measures in the 2000 Biological Opinion RPAs and the 2004 Biological Opinion Final Updated Proposed Action.

If the Court were to rule that the habitat actions developed for the 2008 Biological Opinion and the Accords are not reasonably certain to occur *by reason of this review process* established in the Northwest Power Act, the Court would be setting up an unnecessary conflict between the ESA requirements and the review requirements of the Power Act, and in doing so might allow the federal agencies to ignore the latter. The result would be truly unfortunate for the sound implementation of public policy to benefit fish and wildlife. This is not a necessary conclusion that the Court must reach, as it has been and will continue to be possible to harmonize the ESA requirements and the public review process included in the Northwest Power Act, rather than set them at odds.

The Council recognizes the NWF plaintiffs make other arguments contesting the validity under the ESA of the way the federal agencies rely on and analyze off-site mitigation measures, including whether the information in the record is sufficient to justify the survival improvements indicated. We reiterate that the Council takes no position on these and other issues raised in the summary judgment motions as to whether the Biological Opinion satisfies the substantive requirements of the Endangered Species Act. We ask only that the Court reject the one particular assertion that the Council's review process required under the Northwest Power Act is a reason to find the habitat measures are not reasonably certain to occur.

Respectfully submitted October 24, 2008.



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CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c) and F.R. Civ. P. 5(d), I certify that on October 24, 2008, this Memorandum of Amicus Northwest Power and Conservation Council will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon all parties enrolled to receive such notice. The following will be manually served by first class U. S. Mail:

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